Supreme Court, U.S.
FILED
OCT 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-503

IN THE

Supreme Court of the United States

October Term, 1987

VICTOR L. GANOE, THOMAS A. GANOE,
EDWIN A. GANOE, DANIEL K. GANOE,
SANDRA I. GANOE COLLAR, MARY GANOE PRICE,
CHERRIE GANOE LO DESTRO and CLEO GANOE SMITH,
Petitioners,

vs.

WILLIAM LUMMIS, Temporary Administrator
of the Estate of
HOWARD ROBARD HUGHES, JR.
and
GEORGE F. NEFF, Independent Executor
of the Estate of
ANNETTE GANO LUMMIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether New York Supreme Court, Appellate Division, Fourth Department, denied Petitioners any rights under the Fifth and Fourteenth Amendments of the United States Constitution by affirming the dismissal of Petitioners' complaint because of lack of subject matter jurisdiction and a failure to state a cause of action?

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The Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of the State of New York, Appellate Division, Fourth Department, dismissing Petitioners' complaint.

Opinions Below

On May 29, 1986, the New York Supreme Court, Special Term, Erie County dismissed Petitioners' complaint[1]. Petitioners appealed to the New York Supreme Court, Appellate Division, Fourth Department. That court unanimously affirmed dismissal of Petitioners' complaint both for want of subject matter jurisdiction and failure to state a cause of action. 129 A.D.2d 1006 (4th Dep't). Petitioners then sought review by the New York Court of Appeals; however, on July 7, 1987, the New York Court of Appeals denied Petitioners' Motion for Leave to Appeal. 70 N.Y.2d 602 (1987).

Jurisdiction

No federal question, let alone, a substantial question, was decided in the state court proceedings. In this connection, it is significant that Petitioners wholly fail to comply with Rule 21(h) of this Court.

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[1] Petitioners failed to append a copy of Special Term's decision. It is attached as Appendix A.

Provisions of Law Involved

New York Civil Practice Law and Rules

R. 3211. Motion to dismiss.

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

. . . .

2. the court has not jurisdiction of the subject matter of the cause of action; or

. . . .

7. the pleading fails to state a cause of action . . . .

. . . .

Statement of the Case

Petitioners, who claim to be maternal seventh cousins of Howard R. Hughes, Jr., sought by their complaint filed in New York Supreme Court, Erie County, to circumvent the courts of Texas and obtain a share of his intestate estate, despite the fact that (i) they had not pleaded they were his intestate distributees, (ii) admitted they were not and (iii) had been finally determined not to be such intestate distributees by the courts of Texas, the state having jurisdiction of the probate of his estate.

Respondents moved to dismiss the complaint under New York Civil Practice Law and Rules, Rule 3211(a) for lack of subject matter jurisdiction, failure to state a cause of action and on other grounds. Respondents also moved for sanctions against Petitioners and their counsel for commencing frivolous litigation. Special Term granted Respondents' motion to dismiss the complaint, basing its decision specifically on lack of subject matter jurisdiction, but declined to award sanctions. The court stated:

> Howard R. Hughes, Jr. died a non domiciliary of the State of New York without owning any real or personal property or other assets in the State of New York. His estate was administered in a foreign forum by fiduciaries appointed or acting on behalf of the estate in that same forum and not in New York. Simply put, as urged by defendants, there is absolutely *nothing* to connect the courts of this state with the foreign administration of the estate of Howard R. Hughes, Jr.

Petitioners appealed the dismissal of their complaint and Respondents cross-appealed the denial of sanctions to the Appellate Division, Fourth Department.[2]

In unanimously affirming the dismissal of the complaint, the Appellate Division observed:

> Even if the court had subject matter jurisdiction to entertain this action, the complaint was properly dismissed since it fails to state a cause of action. Plaintiffs have not alleged that they are distributees of the estate or that they have any other interest therein. In fact, they unsuccessfully litigated that issue in the Texas courts and exhausted their rights on appeal when the United States Supreme Court denied certiorari (Ganoe v. Neff, _____ U.S. _____, 90 L. Ed. 2d 696 [decided May 27, 1986]). Lacking any interest in the estate, plaintiffs can claim neither damage nor breach of duty owing to them by reason of any fraud or negligence in its administration.

129 A.D.2d 1006-7.

On July 7, 1987, the New York Court of Appeals denied Petitioners' motion for leave to appeal. 70 N.Y.2d 602.

The record consists principally of the papers evidencing the controlling proceedings in the Texas courts.

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[2] In *A.G. Ship Maintenance v. Lezak*, 69 N.Y.2d 1 (1986), announced after Respondents had filed their notice of cross-appeal, the New York Court of Appeals ruled that sanctions for frivolous actions could not be imposed if at the time of instituting the action neither a statute nor court rule authorized their imposition. Because there was no such statute or rule in effect when this action was instituted, Respondents did not press their request for sanctions in the Appellate Division and that court did not address the issue.

The Texas probate court, by a judgment dated April 10, 1978, determined that Mr. Hughes died intestate on April 5, 1976, a domiciliary of Texas (R. 46-47[3]). Because the estate had no real or tangible personal property in New York (R. 50-104), no proceedings for ancillary administration were commenced in New York. On November 13, 1981, the Texas probate court entered a final judgment determining that only descendents of the grandparents of Mr. Hughes were entitled to share in his estate (R. 113-121). Papers filed by some of the Petitioners showed that they and Mr. Hughes were, at best, eight generations removed from any alleged common ancestor (R. 147-153). Nevertheless, Petitioners sought to reopen the heirship proceedings and set aside the final judgment. On August 30, 1985, the Texas probate court granted summary judgment dismissing Petitioners' claims (R. 327-331), after which their appeals to the Court of Appeals for the First Supreme Judicial District of Texas and the Supreme Court of Texas were dismissed (R. 518-522). A petition for a writ of certiorari was denied by this Court on May 27, 1986. *Ganoe v. Neff*, _____ U.S. _____, 90 L. Ed. 2d 696 (1986).

[3] "R" refers to pages of the Record on Appeal in the Appellate Division.

REASONS FOR DENYING THE WRIT

This case was dismissed at Special Term for lack of subject matter jurisdiction and the dismissal was unanimously affirmed by the Appellate Division. That court also observed that the complaint failed to state a cause of action. It follows that the only conceivable question for review is whether the New York state courts, in disposing of the case on those two grounds, denied Petitioners due process. Petitioners totally fail to address those grounds. Instead, their Petition is largely given over to an irrelevant discussion of *in personam* jurisdiction (Pet. 10-19) which, as it happens, is an additional ground for dismissal not even reached by the state courts.

A. Dismissal of the Complaint was Proper for Lack of Subject Matter Jurisdiction.

Petitioners' Argument (Pet. 9-10) comes down to a factual contention that the Hughes estate owned property in New York and is "doing business" in New York. But Special Term found specifically that the Hughes estate owned no property in New York and that the courts of New York have no connection with the estate. The Appellate Division affirmed. These findings independently support their holdings that the New York courts have no subject matter jurisdiction over the Hughes estate.

Subject matter jurisdiction of this estate lies in Texas. Petitioners failed at Special Term, failed in the Appellate Division and still fail to offer any reason or authority why a New York court should involve itself in the heirship and administration of a foreign estate. Of controlling significance, however, Petitioners fail to explain here and never suggested to the New York courts why their refusal to so involve themselves denied Petitioners due process.

B. Dismissal of the Complaint was Proper Because Petitioners Lack any Interest in the Hughes Estate.

Dismissal of the complaint was also required because of the plain lack of merit of Petitioners' complaint since it did not even allege that Petitioners were intestate distributees of Mr. Hughes. The most specific allegation in the complaint of any relationship between Petitioners and Mr. Hughes is the first paragraph: ". . . Plaintiffs were and still are residents of the County of Erie and State of New York and close relatives of Howard Robard Hughes, Jr." In fact, Petitioners admitted they were not intestate distributees and the courts of Texas held they were not. The Appellate Division found specifically that Petitioners lack any interest in the Hughes estate. This finding independently supports its holding that Petitioners' complaint failed to state a cause of action. Although Petitioners' claims are cloaked in the florid language of fraud and negligence, they all depend on a non-existent relationship to Mr. Hughes—one that would entitle them to some distribution from his estate. If they are relatives, they are far too remote to have any complaint concerning the way the Hughes estate was administered. Even assuming "a secret and conspiratorial agreement" (Pet. 4)[4] (an absurd

[4] There were no secret agreements—they have been on file in Texas for more than ten years. They were executed, as their terms make clear, to eliminate questions about Mr. Hughes' possible domicile in Mexico, the Bahamas, England, Nicaragua, Canada, Nevada, Texas and California and their differing laws of succession, descent and distribution. They could be amended, and were in fact, amended, to include additional persons who established legitimate heirship. Thus, the agreements reallocated among the judicially determined heirs the shares they were entitled to receive in any event. Such agreements were no fraud upon anyone—most notably not upon Petitioners or any other strangers to the real Hughes heirs (R. 435-517).

assumption belied by the entire record of the Texas proceedings which were conducted with scrupulous regard for the rights of any person claiming an interest in the Hughes estate), Petitioners, if they are related at all, are, at best, seventh cousins and have no standing to question those proceedings. Mr. Hughes left surviving numerous first cousins and an aunt on the maternal side. It follows that Respondents owed Petitioners no duty and Petitioners sustained no damage from any of Respondents' alleged acts. The Petition is totally silent on this dispositive point.

Conclusion

Respondents respectfully submit that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Opinion of New York Supreme Court, Special Term, Erie County

STATE OF NEW YORK
SUPREME COURT
County of Erie

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY G. GANOE PRICE, CHERRIE GANOE LO DESTRO, and CLEO GANOE SMITH,

Plaintiffs,

vs.

WILLIAM LUMMIS, Temporary Administrator of the Estate of HOWARD ROBARD HUGHES, JR. and GEORGE F. NEFF, Independent Executor of the Estate of ANNETTE GANO LUMMIS,

Defendants.

RICHARD D. GRISANTI
for Plaintiffs

PHILIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (ALEXANDER C. CORDES, of counsel)
for Defendants

Appendix A—Opinion of New York Supreme Court, Special Term, Erie County.

MEMORANDUM

KASLER, J.

Motion to dismiss plaintiffs' complaint pursuant to CPLR §3211, subd [a], paragraph 2, is hereby granted. Plaintiffs, the self proclaimed "close relatives" of billionaire recluse Howard R. Hughes, Jr., have commenced suit in this forum seeking injunctive and monetary relief against defendants as fiduciaries of the Hughes estate upon the grounds of alleged fraud and negligence in connection with the heirship determination and administration, including settlement agreements, of the Hughes estate by and within the state courts of foreign jurisdictions.

Defendants, citing numerous grounds, only one of which will be discussed inasmuch as it will be dispositive of the motion before the court, have moved for dismissal of plaintiffs' complaint and the imposition of sanctions. In response, plaintiffs have opposed defendants' motion and cross moved for partial summary judgment.

CPLR 3211, subd [a], provides for a motion to dismiss one or more causes of action upon the ground that "the court has not jurisdiction of the subject matter of the cause of action" (para 2). Subject matter jurisdiction has been defined as the "power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question." *Hunt v Hunt*, 72 NY 217, 229. A distinction must be drawn between a court's competence to entertain an action and its power to render a judgment on the merits. Absence of the former deprives

the court of subject matter jurisdiction; absence of the latter to reach the merits does not. (*Lacks v Lacks*, 41 NY2d 71, 75). Subject matter does not mean "this case" but "this kind of case", (*Matter of Rougeron*, 17 NY2d 264, 271), and it had been said by no less an authority than former Chief Justice Breitel that "a statement that a court lacks 'jurisdiction' to decide a case may, in reality, mean that elements of a cause of action are absent (citation omitted)." *Lacks v Lacks, supra*, p 74.

With respect to plaintiffs' claims the result should be evident. Howard R. Hughes, Jr. died a non domiciliary of the State of New York without owning any real or personal property or other assets in the State of New York. His estate was administered in a foreign forum by fiduciaries appointed or acting on behalf of the estate in that same forum and not in New York. Simply put, as urged by defendants, there is absolutely *nothing* to connect the courts of this State with the foreign administration of the estate of Howard R. Hughes, Jr.

All other motions are denied.

Submit order accordingly.

DATED: Buffalo, New York
May 29, 1986

THEODORE S. KASLER
Theodore S. Kasler
Justice of Supreme Court